

IN THE HIGH COURT OF FIJI ATSUVA
APPELLATE JURISDICTION

CIVIL ACTION NO. HBA 11 OF 2012

BETWEEN : ALDEX TRADING
Appellant

AND : GODREJ SINGAPORE PTE LTD
Respondent

Counsel : Mr. S. Kumar for the Appellant
Mr. P. Knight for the Respondent.

Date of Hearing : 25th March 2014

Date of Judgment : 24th April 2014

JUDGMENT

[1]. The appellant in this matter is appealing against the decision of the learned Magistrate where by an award was made against the Defendant on 2.3.11. The appellant was the defendant in the Magistrate Court case while the Respondent was the plaintiff.

Background

[2]. The plaintiff had filed an action to recover the balance due for goods sold and delivered to the defendant.

- The plaintiff's case had been called on 3.12.09 to fix a hearing date.
- The learned Magistrate had fixed the case for hearing on 9.9.10 at 11.00 am.

- It was submitted that the plaintiff had filed a motion and affidavit seeking summary judgment on 16.2.10 both the motion and the affidavit had been dismissed and the court had confirmed the hearing date which had been fixed for 9.9.10.
- It was submitted that on 9.9.10 at 10 am the court had called the case and in the absence of the defendant and the solicitor for the defendant, the court allowed plaintiff to commence the case and allowed for formal proof of his case. Thereafter the court had fixed the case for judgment.
- On the same day at 11 am which was the time the court had originally fixed the case for hearing, the Solicitor and the defendant appellant had appeared before the court. Upon making submissions about the time fixed for hearing, the learned Magistrate had understood the error, however as the solicitor and the plaintiff by that time had left the court, the case was fixed for 11.9.10 to vacate the formal proof.
- On 16.9.10 there had been a new Magistrate and it was submitted and conceded by the Respondent's Solicitor that the formal proof had been vacated and the main case had been fixed for hearing.
- On 12.11.10 the case had been called and fixed for 23.11.10. On 23.11.10 it was called before another Magistrate. On this day both parties had made submissions as to what had transpired in the case and the court had adjourned it for 15.12.10 to decide on how best to proceed in this matter. It was submitted that thereafter the case had been mentioned on several dates and on 2.3.11 the court had delivered its final decision, which determined the parties' substantive rights.
- It is submitted that without having a formal hearing or without giving an opportunity for the defendant to canvas his defence the learned magistrate had proceeded to deliver the decision on 2.3.11, awarding the respondent a sum of FJS36, 958.66 and cost.

- The Defendant/Appellant had filed the appeal on the following grounds of appeal :

1. *The Learned Trial Magistrate erred in Law and in fact when she proceeded to deliver judgment on formal proof evidence when such formal proof evidence was set aside by the Magistrate who conducted it.*
2. *The Learned Trial Magistrate erred in law and in fact when she denied the Defendant the right of hearing and putting his case before the adjudating tribunal and the trial that was conducted by the Learned Trial Magistrate is very prejudicial to the Defendant.*
3. *The Learned Trial Magistrate erred in law and in fact when she proceeded to hear civil action in breach of Order XVI of the Magistrates Court Act Cap 14.*
4. *The Learned Trial Magistrate erred in law and in fact when she failed to consider that the Defendant has filed his statement of defence and denied the liability.*
5. *The Learned Trial Magistrate erred in law and in fact in failing to act judiciously in pronouncing judgment in favour of the Plaintiff when the defendant was under new ownership.*

Determination

- [3]. As per the chronology of events that has taken place it is evident that the case had been fixed for hearing on 9.9.10 at 11.00 am.
- [4]. However it was submitted that on that day the case had been heard at 10.00 am. The Defendant was not present nor represented. The learned Magistrate proceeded with the formal proof.

- [5]. At 11.00 am which was the time the case had been originally fixed for hearing, the counsel for the defendant had come with the defendant and as per the copy record, at 11.00 am the same day the court realising the mistake had fixed the case to be mentioned to vacate the formal hearing. It was submitted that this had to be done because by 11.00 am the plaintiff and his Solicitor had left the court.
- [6]. The copy record entry on 16.9.10 states that case is fixed for hearing. The Respondents Counsel conceded that as per what is recorded, only hearing that was meant was to reopen the case by vacating the formal proof. When the formal proof is vacated there is no evidence before the court.
- [7]. The Respondent submits that the decision of the court was not only based on formal proof but affidavit evidence as well. Respondent had submitted the affidavit and the annexures with a motion for summary judgment. However as per copy record of 16.2.10 the court has dismissed the motion and the affidavit. Accordingly it is submitted that the learned Magistrate has come to the decision with the evidence that had been heard in the formal proof and the affidavit that was filed with the motion.
- [8]. Under the circumstance I find the learned Magistrate had erred when she arrived at the decision basing her findings on the evidence led at the formal proof and the affidavit evidence, as the learned magistrate has failed to consider the fact that the court had already vacated the formal proof and dismissed the affidavit, thus there was no evidence before the court for the learned Magistrate to come to the decision. Accordingly I hold that the Appellant is successful on ground numbers 1 and 2 of the Grounds of Appeal.
- [9]. It is also pertinent to note that the defendant had filed a defence and court had fixed the case for hearing on 9.9.10 at 11.00 am.
- [10]. It was submitted that by an oversight the case had been heard at 10.00 am in the absence of the defendant. However the Appellant had arrived at the schedule time. It was also submitted that formal proof was called not due to any action or inaction of the defendant but due to an error pertaining to the time. However the result was that it deprived the defendant's right to cross-examine and submit his defence.

- [11]. The Appellant submitted that depriving him the right to cross examine and submit his defence was a violation of natural justice. The Respondent's counsel conceded in this matter.
- [12]. By an error the defendant had been deprived of a fair trial and the court had proceeded to deliver judgment without any evidence before court.
- [13]. When questioned by this court, the Respondent's counsel agreed that the case had been fixed on 9.9.10 at 11.00am but in fact the case had been heard at 10.00am, counsel also agreed that when it was brought to the notice the learned Magistrate had vacated the formal hearing and fixed it for hearing between parties. Further the Respondent also conceded that the Respondent's motion for summary judgment and affidavit had been dismissed by court.
- [14]. This court observes that there had been several Magistrates during the hearing of the cause.
- [15]. As per the submission this court holds that the Defendant/ Appellant had been denied a fair trial. It was brought to the notice of this court the decided case **BP South West Pacific Ltd -vs- Gopal Pillay, Suva HC 167/93; 4.12.96**, where Justice Pathik had held:

“That fundamental duty of the court is to do justice between parties. It is in turn fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter.”

- [16]. The Respondent submitted that there was evidence for the learned Magistrate to give the decision impugned in this appeal. The Respondent relies on the affidavit evidence that are in pages 13-27 of the copy record and the evidence of one Mr. R. Rastamja at pages 35 and 36 to substantiate this argument.
- [17]. On perusing the court record it's observed on 16.2.10, the learned Magistrate had dismissed the said affidavit and on 16.9.10 when the learned Magistrate had fixed the matter for hearing both counsel agreed that the formal proof is vacated. Thus there is no evidence before court. Accordingly I decline to accept the opposition of the Respondent.

[18]. The Respondent also submitted that the Magistrate had adopted Order 14 of the High Court Rules and has given summary judgment but this opposition is negated by Respondent's own submission. The respondent concedes that the application for summary judgment was disallowed by the learned Magistrate and as submitted in the absence of any evidence before the court the learned Magistrate would not have been in a position to give summary judgment, accordingly I decline to accept this opposition to appeal by the Respondent.

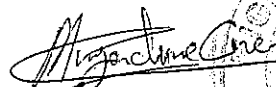
[19]. It was submitted that Appellant's grounds of appeal number 2,3,4,5 deals with rules of natural justice and it was submitted that the defendant was deprived the right of cross-examination and the right to be heard the rules of natural justice was violated.

Conclusion

[20]. The Appellant has been successful in the first and second grounds of appeal and that itself is sufficient for this court to set aside the judgment made by the learned Magistrate dated 2.3.11. However, for the reasons I have stated in this judgment this court is inclined to accept the submission of the Appellant pertaining to violation of rules of natural justice.

[21]. Accordingly I make the following orders:-

- a) **The Appellant's appeal is allowed.**
- b) **The judgment of the learned Magistrate dated 2.3.11 is set aside.**
- c) **The case is sent back to the Magistrate's court for retrial on merits.**
- d) **The Respondent shall pay a cost of FJS750 summarily assessed to the Appellant.**


Mayadunne Corea

JUDGE
24/04/14

